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No. _____

In The

Supreme Court of the United States

PARTIDO ACCIÓN CIVIL,

Petitioner,

v.

COMMONWEALTH OF PUERTO RICO

On Petition For A Writ Of Certiorari To The Supreme Court Of Puerto Rico

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Commonwealth of Puerto Rico constitutionally prohibit everyone but lawyers from circulating citizen petitions seeking to place a new political party on the ballot?

PARTIES

In addition to the parties named in the caption, the parties in the Supreme Court of Puerto Rico were Juan R. Melecio, Manuel Herrero, Damaris Mangual and René Arrillaga, individually and in their official capacities as members of the Commonwealth Elections Commission.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

The Partido Acción Civil (Civil Action Party) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Puerto Rico in this case.

OPINIONS BELOW

The opinions of the San Juan Superior Court (App.[1] C, *infra*, pp. 1c-26c), the Circuit Court of Appeals, Regional Circuit I (App. B, *infra*, pp. 1b-20b), and the Supreme Court of Puerto Rico (App. A, *infra*, pp. 1a-41a), are unreported. The opinion of the Supreme Court of Puerto Rico denying reconsideration (App. D, *infra*, pp. 1d-50d) is also unreported. The opinions reproduced in the Appendix are English translations from the original Spanish, prepared by interpreters certified by the Administrative Office of the United States Courts.

JURISDICTION

The Supreme Court of Puerto Rico entered its judgment on February 25, 2000 (App. A, *infra*, p. 1a), and denied a timely motion for reconsideration on April 25, 2000 (App. D, *infra*, p. 1d). The jurisdiction of this Court is invoked under 28 U.S.C. § 1258.

STATUTES AND REGULATIONS INVOLVED

1. Subsections (3) and (4) of Section 3101 of the Puerto Rico Electoral Act, 16 Laws of Puerto Rico Annotated (L.P.R.A.), provide, in relevant part:

> § 3101. **The parties**
>
> (3) Party by Petition – Shall be any group of citizens who, desiring to appear on the electoral ballot of a general election, shall register as a political party, on or

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[1] "App." citations are to the Appendix to this petition, *infra*.

before June 1 of the election year, by filing with the Commission sworn petitions to such effect, before notary publics duly admitted to the practice of notary, pursuant to the provisions of the Notary Act in effect, who shall collect from the Electoral Commission a fee of one (1) dollar for each valid, notarized petition signed by a number of electors of no less than five (5) percent of the total votes cast for all candidates for the office of Governor in the preceding general election. A government program or political platform, as well as the names and addresses of the group of electors that constitute its central directing body, must also be presented.

The party shall become registered upon acceptance of said sworn petitions, and from that time on may present a complete slate in all the precincts in accordance with the procedures provided in this chapter.

(4) Local Party by Petition – Shall be any group of citizens that for the purpose of appearing on the electoral ballot of precinct, or specific representative district or senatorial district, in a general election, is registered as a local political party, by filing with the Commission sworn petitions to such effect, subscribed in each of the precincts in which its candidacy should appear, by a number of electors which is not less than five (5) percent of the total votes cast in each precinct concerned, for all of the candidates for the office of Governor in the preceding general election. It shall also present a government program or political platform, as well as the names and addresses of the group of voters that constitutes its central directing body.

> The Local Party by Petition shall become registered upon acceptance of said petitions by the Commission. . . .

2. Section 3102 of the Puerto Rico Electoral Act, 16 Laws of Puerto Rico Annotated, provides:

> § 3102. **Invalid petitions for registration of party**
>
> The Commission will reject every petition for the registration of a political party signed by a person:
>
> (a) Who is not a duly registered elector on the date he signs the petition;
>
> (b) Who during the immediately preceding two- (2) year period has signed a petition to register another party; or
>
> (c) Who has not complied with the formalities established in this subtitle or the regulation adopted hereunder, including the veracity and authenticity of the data stated in the registration petition.
>
> The registration petitions of a political party must be filed before the Commission no later than seven (7) days after having taken the oath in question. The Commission, through regulations, shall establish the form and the procedures to be followed for the filing and accepting of said registration petitions.

3. Section 3161 of the Puerto Rico Electoral Act, 16 Laws of Puerto Rico Annotated, provides, in relevant part:

> § 3161. **Officials to swear petitions for primaries**
>
> Petitions for primaries may be sworn to before the officials authorized by law to take oaths, as well as before any elector authorized by the Commission to perform such duty, at the request of each candidate for primaries.
>
> Persons authorized to take oaths related to petitions for primaries shall be deemed

officials of the Commission for all legal effects, and they shall keep a record of all persons sworn, and the date on which the oath has been taken. This record shall be signed and sent to the Commission at the end of the period for filing petitions for primaries. . . .

4. Section 2011 of the Puerto Rico 1987 Notarial Act, 4 Laws of Puerto Rico Annotated, provides, in relevant part:

§ 2011. **Notarial practice – requirements**

Only those presently authorized to practice the notarial profession and those attorneys who in the future are admitted to practice the profession, who are members of the Puerto Rico Bar Association and are thereafter authorized to practice as notaries by the Supreme Court of Puerto Rico, shall practice the notarial profession in the Commonwealth of Puerto Rico.

5. Section 4.7 of the Rules for the Registration of Party By Petition of the Commonwealth Elections Commission provides as follows:

§ 4.7. **Reasons to deny a registration petition**

The Commission will deny any inscription petition if:

(a) on the date of submitting the petition the person is not a registered voter;

(b) the elector signed a petition for the registration of another party during the period of two (2) years immediately precedent to the date of submitting the petition;

(c) the petition is submitted seven (7) days after taking the oath;

(d) the signature or mark is missing;

(e) there is a mark in substitution for the signature if the person stated that he or she knows how to write;

(f) the signature of the petitioner is incompatible with the one that appears in the petition for registration;

(g) there is a discrepancy in the name of the father, mother or both;

(h) there is a discrepancy in the age;

(i) there is no notarial seal;

(j) the petition does not have the notary's signature;

(k) the petition has been notarized before a notary whose name has not been notified to the Commission;

(l) the petition appears duplicated and given to the same party;

(m) the petition lacks any required information.

STATEMENT

Introduction

Puerto Rico's election code requires new political parties seeking access to the Commonwealth's general election ballot to file individual party-registration petitions signed by approximately 100,000 registered voters. Unlike other election-related petitions in Puerto Rico, these petitions are valid only if each is separately notarized by a lawyer who is both a notary and a member of the Puerto Rican bar. As a result, only lawyers can effectively circulate the petitions necessary for a new party to appear on the ballot. This lawyer-only restriction has made it virtually impossible for petitioner, or any other new political party, to obtain a place on the ballot; no new party has been registered since 1984.

Petitioner challenged the lawyer-notarization requirement in Puerto Rico's courts as a violation of both the Puerto Rico and United States Constitutions. The Puerto Rican courts have upheld the lawyer-notarization requirement by applying rational basis review. Petitioner

believes that this was clear constitutional error. This Court's decisions in *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), require strict judicial scrutiny – not rational basis scrutiny – of laws substantially reducing the number of citizens able to circulate initiative petitions. That rule should apply as well to laws limiting those who may effectively circulate petitions seeking ballot access for a new political party. If heightened scrutiny is correctly applied to Puerto Rico's rule that only lawyers may notarize petitions supporting ballot access for a new political party, it is plain that the rule is not narrowly tailored to serve the Commonwealth's legitimate interests.

A. Puerto Rico's Electoral System

1. The Commonwealth of Puerto Rico holds Commonwealth-wide general elections for all elected offices every four years. Only "registered" political parties may appear on the ballot throughout Puerto Rico in these elections. 16 L.P.R.A § 3101(3), *supra*, p. 1. There are currently three such Commonwealth-wide registered parties in Puerto Rico: the New Progressive Party (PNP), the Popular Democratic Party (PPD), and the Puerto Rican Independence Party (PIP). The first two of these Parties (the PNP and the PPD), have governed Puerto Rico since 1944. They received, respectively, 51% and 45% of the vote for Governor in the 1996 general election. Registered parties are entitled to receive straight-party votes and present a full slate of candidates on the general election ballot. Parties remain registered as long as they continue to receive a minimum vote total; if they fail to achieve that goal at a general election they lose their registered status.[2]

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[2] Registered parties must receive either 3% of the straight party vote or 5% of the vote for Governor to remain on the ballot. 16 L.P.R.A. § 3101(1). Voters may vote a straight-party ticket for all of the candidates of a registered party by marking a single box.

The registered parties receive substantial public funding for their electoral activities and also have an important official role in the administration of elections. Registered parties are entitled to receive $300,000 per year from the Commonwealth's Electoral Fund in non-election years and $600,000 in general-election years. 16 L.P.R.A. § 3116. The Commonwealth Elections Commission, which administers the Electoral Fund and enforces the provisions of the election laws, is composed of a Chairman and Commissioners designated by each registered party. 16 L.P.R.A. §§ 3004, 3007. Political groups that are not registered parties have no realistic opportunity to win an election; they cannot present a full slate of party candidates, cannot receive straight-party votes, have no representation on the Elections Commission, and they must compete with parties that receive substantial public funding.

2. This case concerns the constitutionality of Puerto Rico's statutory process for achieving Commonwealth-wide registered party status. A new party seeking such status must, on or before June 1 of the year in which a general election is to be held, file with the Elections Commission individual registration petitions, each signed and sworn to by a registered voter. The number of such petitions must be equal to at least 5% of the votes cast for Governor in the preceding general election.[3] 16 L.P.R.A.

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[3] Any registered voter who has not signed a petition to register another party within the preceding two-year period may sign and swear to a petition. 16 L.P.R.A. § 3102(b), *supra*, p. 3. Each registered voter wishing to support a new party's attempt to register must sign a separate petition, which is in the form of an affidavit. In addition to the voter's name and signature, each petition contains the voter's date and place of birth, the names of the voter's father and mother, the voter's address, and the statement that the voter is registered and has not signed another party's petition within two years. A petition form is reproduced in Appendix F to this petition.

§ 3101(3). The number of petitions currently required is 97,874 (5% of the votes cast for Governor in 1996).

At issue in this case is the additional statutory requirement that each of these 97,874 separate registration petitions be signed and sworn to before "notary publics duly admitted to the practice of notary." 16 L.P.R.A. § 3101(3), *supra*, p. 2. This is not a notarization requirement of the type that is familiar in the continental United States, where notaries are not part of the legal profession and are widely available. In Puerto Rico, only "attorneys . . . who are members of the Puerto Rican Bar Association and are thereafter authorized to practice as notaries by the Supreme Court of Puerto Rico, shall practice the notarial profession." 4 L.P.R.A. § 2011, *supra*, p. 4. In Puerto Rico, therefore, one can be a lawyer without being a notary, but one cannot be a notary without being a lawyer. For each citizen registration petition to be valid, it must thus be signed and sworn to before a practicing lawyer who has also been certified as a notary by the Supreme Court of Puerto Rico.[4] There are presently about 6,700 such attorney-notaries in Puerto Rico out of approximately 10,000 members of the Puerto Rican bar. (App. 26a).

After it is notarized, the petition must then be filed with the Elections Commission within seven calendar days. 16 L.P.R.A. § 3102, *supra*, p. 3. Within that seven-day period the attorney-notary must complete extensive paperwork required by law for all notarizations by lawyer-notaries. The attorney-notary is entitled to collect from the Elections Commission a fee of one dollar for each valid, notarized petition that is filed. 16 L.P.R.A. § 3101(3). In seeking registration, a new party must, before soliciting voter petitions, present to the Elections

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[4] In order to become a member of the Puerto Rican bar, a resident of Puerto Rico must graduate from both college and law school and pass the Commonwealth's bar examination. An additional examination is required for authorization to become a lawyer-notary. Notaries must pay annual Bar Association dues and post a bond for at least $15,000. 4 L.P.R.A. § 2011.

Commission "a government program or political platform, as well as the names and addresses of the group of electors that constitute its central directing body." *Ibid.* After the petitions are submitted, the Elections Commission is required to review them to insure their validity. That review must include a determination whether each registered voter's signature and identifying data are compatible with the signature and data on file with the Commission. Rules for the Registration of Party by Petition of the Elections Commission § 4.7, *supra*, pp. 4-5.

3. The requirement that every registered voter who wishes to submit a Commonwealth-wide political party registration petition must sign and swear to that petition in the presence of an attorney-notary was first enacted into law in Puerto Rico in 1978. Since 1980, the date when that new requirement first went into effect, only one party has been able to achieve Commonwealth-wide registration. That party, the Puerto Rican Renovation Party (PRP), had been a faction of the New Progressive Party (PNP), which held power in Puerto Rico from 1976 to 1984. The PRP's president was the PNP's elected mayor of San Juan and its vice president had twice been speaker of Puerto Rico's House of Representatives. The PRP participated in the 1984 election, but did not secure enough votes to remain on the ballot. It tried to register again in 1988, but failed. No new party has been able to obtain Commonwealth-wide ballot access since 1984, although seven parties, including petitioner, have tried to do so. Since that time, two parties have achieved local registration, to which the attorney-notary requirement does not apply (App. 16d-17d).

The attorney-notarization requirement is not applied by Puerto Rican law to any other ballot-access procedure. For example, a candidate seeking a place on the ballot in a primary election held by one of the three registered parties needs to gather a minimum number of notarized signatures, but these signatures may be notarized by so-called *ad hoc* notaries, appointed by the Commonwealth Elections Commission. See 16 L.P.R.A. § 3161, *supra*, p. 3.

Ad hoc notaries do not need to be lawyers or have any other particular qualifications. They are ordinarily campaign workers who have volunteered to work for a candidate; the candidate submits their names to the Commission for *ad hoc* notarial appointment. The *ad hoc* notary process for gathering petition signatures also applies to candidates seeking a place on the general election ballot as independent candidates, 16 L.P.R.A. § 3177, and the Electoral Act does not require parties seeking party registration and ballot position as local, rather than Commonwealth-wide, parties to use lawyer notaries. See 16 L.P.R.A. § 3101(4), *supra*, p. 2. The *ad hoc* notary process has also recently been used where public funding, as well as ballot position, was involved. In Puerto Rico's recent (1998) plebiscite election (concerning the Commonwealth's future political relationship with the United States), political groups supporting one of the several choices on the plebiscite ballot were entitled to receive $666,666 in public funding from the Elections Commission if they submitted approximately 2,500 notarized petitions. (App. 21a, 26d-27d). These petitions were valid if sworn to before *ad hoc* notaries – lawyer notarization was not required. Thus, the requirement of having every voter petition separately notarized by a lawyer is applied only to new parties seeking a place on Puerto Rico's general election ballot.

B. The Civil Action Party

Petitioner Civil Action Party is a political organization created by citizens seeking to participate meaningfully in the political life of Commonwealth of Puerto Rico. They believe that the two parties that have monopolized power in Puerto Rico for the last half-century are not willing to bring, nor are they capable of bringing, needed changes to the way in which Puerto Rico is governed. The Party's goals include a more efficient, responsive and participatory government. Party members believe in the need for a more productive economy, free

of federal funds and transfers, and in a new form of political relationship between the Commonwealth and the United States – a relationship that would lead to real and lasting economic development in Puerto Rico.

The Civil Action Party's members have been seeking since July of 1997 to register it on a Commonwealth-wide basis so that a slate of its candidates could appear on the ballot throughout Puerto Rico in the November, 2000, and subsequent general elections. The Party has a candidate for Governor, Enrique Vázquez Quintana, who is a respected physician and former Commonwealth Secretary of Health. He has written three books about the Party's ideology and his experiences as a Commonwealth cabinet member. Announcement of his potential candidacy generated substantial public interest. The Party has registered its name, emblem and the members of its directing body with the Commonwealth Elections Commission and has complied with all other requirements for registration as a political party except for the submission of the requisite number of lawyer-notarized registration petitions (App. 4d). The Party has not complied with this requirement because it has found it impossible to arrange for a sufficient number of lawyers to spend the time necessary to canvass 97,874 registered voters. (App. 6e, 14e-15e).

C. Proceedings Below

1. The complaint in this case (App. E, *infra*) was filed in October, 1998. It challenged the constitutionality, under both the Puerto Rico and United States Constitutions, of the statutory requirement (16 L.P.R.A. § 3101(3)) that party registration petitions be signed and sworn to before an attorney-notary.[5] The complaint alleged interference

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[5] The complaint also challenged the statutory requirement that each petition be filed with the Elections Commission within seven days of its having been sworn. 16 L.P.R.A. § 3102. Although petitioner believes that the seven-day period for filing

with the Party members' federal constitutional rights to free expression and political association, its right of access to the ballot, the right to vote, and violations of the due process and equal protection clauses of both constitutions (App. 5e-9e). Plaintiff sought declaratory relief, a permanent injunction against enforcement of the challenged provision, and an order permitting the party, in seeking party registration, to utilize the *ad hoc* notary process employed in party primary elections, for independent candidates, for local party registration, and in the 1998 plebiscite (App. 12e-16e).

The complaint alleged that the attorney-notary requirement makes it impossible for the Party to gather the number of signatures required for registration (App. 5e). Although the Party had more than twenty non-lawyer registered voters prepared to canvass for registration petition signatures and act as *ad hoc* notaries, if that procedure were to be made available, it had located only two attorneys willing to do that work. Those attorneys were able to work on petition canvassing for only a few hours on weekends and holidays (App. 14e-15e). Attorneys are generally unwilling to serve as notaries for the Party in gathering signatures because "it is prohibitive for an attorney to leave his/her office – with the cost of opportunity that this implies – to go to the street, house by house, or to public places to gather endorsements," and to complete the required paperwork (App. 6e).

2. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The Superior Court granted this motion (App. C, *infra*). The court first held that the Party, as an organization

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sworn petitions with the Commission is unnecessarily brief, it does not seek certiorari from the decision of the Supreme Court of Puerto Rico upholding that requirement. The seven-day deadline is especially onerous in combination with the lawyer-notarization requirement, which is the subject of the certiorari petition, because of the extensive paperwork required of lawyer-notaries within this brief period.

alleging difficulty in registering, had standing to challenge the two statutory provisions (App. 6c-8c). It then held that the doctrine of primary jurisdiction did not require the Party initially to seek relief through proceedings before the Elections Commission (App. 8c-10c). On the merits of the Party's claims, the court relied upon the fact that the requirement of notarizing new party registration petitions had been upheld in this Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974). (App. 20c). The court acknowledged in this connection that Texas did "not require notaries to be lawyers," but said that there was no reason "to conclude that the requirement to notarize petitions is only constitutionally valid when the law does not require public notaries to be lawyers" (*Ibid.*). The court held that the attorney-notary requirement "satisfies the State's important interest in preventing fraudulent and frivolous candidacies, that the signatures on the petitions be reliable and that political organizations demonstrate that they have the support of the electorate" (App. 22c).

The Party's equal protection claim was based on the fact that candidates affiliated with the established parties were able to use non-lawyer *ad hoc* notaries in seeking to place their names on the ballot in primary elections, while new parties were not permitted to use the *ad hoc* device. The court held that "this fact does not constitute discrimination based on political ideology, nor unequal treatment," because "[t]he [Civil Action Party] is not equally situated with respect to the traditional parties, because of the fact that it has not been constituted as a party by petition, pursuant to the provisions of the Electoral Act" (App. 22c-23c).

The court's opinion acknowledged that the impact of the requirement that petitions be notarized by lawyers was "substantially onerous," but stated that "a substantially onerous requirement is not inexorably equal to an unconstitutionally onerous one" (App. 23c). The opinion did not address the question whether the challenged

requirements were narrowly tailored to serve the Commonwealth's interests, nor did it explore whether less onerous requirements, such as the widely utilized *ad hoc* notary procedure, supplemented by the Elections Commission's review of the validity of each petition, might satisfactorily serve those interests.

3. The Superior Court's decision was affirmed by the Circuit Court of Appeals (App. B, *infra*). Expressly applying the standard "known in our jurisdiction as the rational nexus or traditional minimum" test (App. 15b), the court held that the challenged registration requirements "do not establish a total arbitrary restriction which does not have any relationship whatsoever to the legitimate interests of the State . . . . [P]laintiff has not been able to establish that no rational relationship exists between the legal requirements and the legitimate governmental purpose." (App. 18b). The court identified avoiding electoral fraud and corruption, fraudulent or frivolous candidacies, and possible voter confusion in the presence of multiple candidates as the governmental interests supporting the attorney-notary requirement. Citing this Court's decisions in *American Party of Texas v. White*, 415 U.S. 767 (1974), and *Williams v. Rhodes*, 393 U.S. 23 (1968), the court stated its view that "the case law of the United States Supreme Court has affirmed the validity of statutes similar to the ones at issue herein" (*Ibid.*)

4. The Supreme Court of Puerto Rico accepted review and affirmed by a vote of four to three (App. 1a-41a, 36a). In rejecting the Party's equal protection claim, the court applied rational basis review and held that "[t]here is a legitimate and objective justification for the State to establish more rigorous requirements" for registration petitions than for other ballot access petitions because of the importance of parties in the electoral system (App. 17a). The majority expressly declined to apply strict scrutiny to the Party's ballot-access claim (App. 23a-24a), apparently because it did not deem the lawyer-notarization requirement to be sufficiently burdensome. The court thus observed that while "[t]here is no doubt" that the

statutory provisions challenged by the party "make it more difficult for a political group that wishes to have access to the electoral ballot to be recognized as a party by petition," that did not show "that the requirements imposed make it *impossible* for a political group to obtain its registration." (App. 26a) (emphasis added). The court upheld the attorney-notary requirement under a standard requiring "a determination as to whether the governmental interests claimed by the state in adopting the regulation are legitimate, and if the importance of those interests justif[ies] the imposition of the regulation challenged" (App. 24a).

Judge Negrón-Garcia, the court's senior member, wrote a dissenting opinion. He observed that the required use of attorney-notaries for party registration petitions was not traditional in Puerto Rico, but had been imposed for the first time in 1978 (App. 38a-39a). In his view, the requirement was unnecessarily restrictive and burdensome. The Commonwealth's interest in preventing fraudulent and frivolous candidates was sufficiently protected by Elections Commission regulations requiring the Commission to determine "the correctness, legality and validity" of each petition, to verify each petition against Commission records, and to reject any petition when "the signature of the petitioner [is] incompatible with what appears in the petition of registration as a voter." (App. 40a). Judges Naveira and Fuster dissented without opinion. (App. 36a).

5. The Party moved for reconsideration, relying primarily on this Court's decisions in *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), both of which employed strict scrutiny, rather than rational basis review, in adjudicating the validity of restrictions on those who could circulate ballot initiative petitions. After hearing oral argument, the court denied the motion, with two Judges dissenting (App. 1d-2d). In a per curiam opinion joined by five members of the court (App. 2d-20d), the court rejected the application of *Meyer* and *Buckley* because of

its view that, unlike the situation in those initiative petition cases, the challenged Puerto Rico party-registration requirements "do not restrict the freedom of speech of the members of the Civil Action Party." (App. 14d). The Court also appeared to rely heavily on its conclusion that the Civil Action Party had not demonstrated "a reasonable diligence . . . to obtain the registration of the party" but had "a tendency to depend exclusively in litigation, with the purpose of obtaining the registration of the Party" (App. 5d). Judge Negrón Garcia again wrote a dissenting opinion (App. 20d-50d). Judge Naveira dissented without opinion (App. 1d).

D. The Parallel Federal Court Proceeding

While the Party's appeal from the dismissal of its complaint was pending in the Commonwealth's Court of Appeals, members of the Party filed a complaint making the same constitutional claims in the United States District Court for the District of Puerto Rico. That complaint was dismissed for failure to state a claim. *Cruz v. Melecio*, Civ. No. 99-1296 (D.P.R. July 7, 1999). Plaintiffs' appeal from this dismissal reached the First Circuit while the Party's appeal from the Puerto Rico Court of Appeals was pending in the Supreme Court of Puerto Rico. The First Circuit reversed the district court's order of dismissal. *Cruz v. Melecio*, 204 F.3d 14 (1st Cir. 2000). It held that the federal action was not barred by res judicata because, under Puerto Rico law, "a commonwealth court judgment cannot be accorded preclusive effect until all available appeals have been exhausted . . . ." *Id.* at 20. On the merits, the court of appeals held that "the district court acted too hastily in dismissing the action for failure to state a potentially viable claim." *Id.* at 22. Citing this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968); and *Norman v. Reed*, 502 U.S. 279 (1992), the court concluded that the complaint "alleges facts which, if true, tend to support the appellant's claims that the notarization requirement

and seven-day deadline unduly burden ballot access. If, for example, the appellants can prove that notarization is prohibitively expensive or otherwise difficult to achieve (as the complaint avers), then the Commission will have to show that the notarization requirement is narrowly drawn to advance a compelling governmental interest. This showing requires the Commission to come forward with proof. Whether it ultimately can succeed in this endeavor is a sufficiently open question that we cannot conclude, on the pleadings, that no set of facts exists under which appellants might prevail." *Id.* (citation omitted).

The First Circuit rejected the Commonwealth's contention that this Court's precedents barred the Party's claims as a matter of law. Specifically, in *American Party of Texas v. White*, "there was no intimation that Texas restricted notarial status to members of the bar, and the relevant signature threshold was one percent of the active electorate, not five percent." 204 F.3d at 22. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Georgia law "required signatures from five percent of the electorate, but contained no concomitant notarization requirement." 204 F.3d at 22. The First Circuit remanded to the district court with instructions to "stay proceedings pending the Puerto Rico Supreme Court's decision in the parallel commonwealth court litigation." *Id.* at 25.

REASONS FOR GRANTING THE PETITION

In recent years this Court has, on at least two occasions, acted to protect the constitutional right of United States citizens to seek political change through the circulation of election-related petitions, an activity that the Court has described as "core political speech," entitled to the strongest First Amendment protection. *Meyer v. Grant*, 486 U.S. 414, 422 (1988). In *Meyer*, a unanimous Court struck down Colorado's prohibition against compensating the circulators of ballot-initiative petitions. And in *Buckley v. American Constitutional Law Foundation*, 525 U.S.

182 (1999), the Court invalidated Colorado's requirement that ballot-initiative petition circulators be registered voters as well as residents. In each case, the Court employed strict or "exacting" judicial scrutiny because "the restrictions in question significantly inhibit communication with voters about proposed political change." In each case the Court found the restriction at issue "not warranted by the state interests . . . alleged to justify these restrictions."[6]

In the present case, the Supreme Court of Puerto Rico, erroneously using rationality scrutiny rather than any form of heightened judicial scrutiny, has upheld a Puerto Rican statute that permits only lawyers to circulate petitions seeking to place a new political party on the ballot. This lawyer-only rule has an immensely more restrictive impact upon the circulation of petitions than the restrictions that were involved in either *Meyer* or *Buckley*. Permitting only lawyers who have also been certified as notaries to circulate registration petitions makes it virtually impossible for petitioner – or any other new political party – to obtain the signatures necessary for ballot access. The effort of citizens to achieve ballot access for a new party in a political system long dominated by two established parties is at least as deserving of constitutional protection as an effort by citizens to put

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[6] The quotations are from *Buckley*, which applied the " 'now-settled approach' that state regulations 'impos[ing] "severe burdens" on speech . . . [must] be narrowly tailored to serve a compelling state interest' " 525 U.S. at 192 n.12. *Meyer* applied "exacting scrutiny," because "the circulation of an initiative petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " 486 U.S. at 420, 421-22. The prohibition on paid petition circulators was unconstitutional because "the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns." *Id.* at 426.

specific legislative proposals on the election ballot.[7] Review by this Court of the incorrect decision below is required in order to afford American citizens living in Puerto Rico[8] the basic constitutional right to advance their political goals through the formation and development of new political parties, a right that "means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).[9]

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[7] Unlike the right to create and develop new political parties, which is constitutionally guaranteed, Norman v. Reed, 502 U.S. 279, 288 (1992); Williams v. Rhodes, 393 U.S. 23, 31 (1968), citizens have no affirmative right under the United States Constitution to propose or adopt state or federal legislation through voter initiative. *See* Meyer v. Grant, *supra*, 486 U.S. at 424.

[8] "It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of Puerto Rico. In particular, we have held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws. We thus think it is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7-8 (1982) (citations omitted) (footnote omitted).

[9] *See also* Norman v. Reed, 502 U.S. 279, 288 (1992): "For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance." (citations and footnote omitted).

The Court has, at times, based its ballot-access decisions on equal protection, rather than First Amendment principles. *See*

I. PUERTO RICO'S REQUIREMENT THAT LAWYERS SEPARATELY NOTARIZE EACH PARTY-REGISTRATION PETITION SEVERELY BURDENS RIGHTS OF FREE EXPRESSION AND ASSOCIATION AND EFFECTIVE VOTING RIGHTS; THIS SEVERE BURDEN CALLS FOR STRICT JUDICIAL SCRUTINY.

The severely burdensome character of Puerto Rico's restriction on the ability of citizens effectively to circulate petitions seeking access to the general election ballot for a new political party is not in serious dispute and was explicitly recognized by the courts below. Puerto Rico requires each voter's party registration petition to be notarized by someone "duly admitted to the practice of notary." 16 L.P.R.A. § 3101(3). Such a notarization requirement might raise no serious constitutional concerns in much of the nation.[10] Puerto Rico, however, requires that notaries must not only be certified as notaries, but that they must in addition be "attorneys . . . who are members of the Puerto Rico Bar Association" 4 L.P.R.A. § 2011.[11] As a result, the

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Anderson v. Celebrezze, 460 U.S. 780, 786-87 n.7 (1983): "In this case, we base our conclusions directly on the First and Fourteenth Amendments, and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment."

[10] *See, e.g.*, American Party of Texas v. White, 415 U.S. 767, 787 (1974), where a Texas notarization requirement for signatures on ballot-access petitions by minority parties was upheld. This Court noted that the parties in that case made "little or no effort to demonstrate [the requirement's] impractibility or that it is unusually burdensome. The District Court determined that it was not, indicating that one of the plaintiff political parties had conceded as much."

[11] In civil law countries, "notary" "has a very different connotation than the term 'notary public' does in the United States. . . . Latin notaries, in contrast to American notaries

pool of Puerto Rican residents qualified to circulate a new party's registration petitions is restricted to the 6,700 practicing lawyer-notaries in Puerto Rico (out of more than 2,300,000 registered voters) who have been "authorized to practice as notaries by the Supreme Court of Puerto Rico," 4 L.P.R.A. § 2011. For their registration petition work, which includes the preparation of four official reports for each endorsement, these lawyer-notaries are compensated by the Commonwealth's Elections Commission at the rate of "one (1) dollar for each valid, notarized petition." 16 L.P.R.A. § 3101(3).

In *Meyer*, the Court held that forbidding payment to petition circulators, thus limiting circulators to unpaid volunteers, "restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." 486 U.S. at 422-23. In *Buckley*, the Court

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public, are state-appointed, private legal professionals who, whenever asked, are required to: (1) carry out nonadvocacy counseling; (2) give private transactions proper legal form and authenticate such transactions in an enforceable public document; and (3) maintain a permanent record of these transactions, for which they must provide certified copies, if requested. . . . The education and admission requirements for becoming a Latin notary are far more stringent than those for admission to the bar in the United States." Cisneros, *Notorius Notaries – How Arizona Is Curbing Notario Fraud in the Immigrant Community*, 32 Ariz. St. L.J. 287, 288, 294-95, 297 (2000). *See also*, Merryman, THE CIVIL LAW TRADITION, 113-15 (1969): "[A]ny similarity between the civil-law notary and the notary public in common-law countries is only superficial. . . . Our notary public is a person of very slight importance. The civil-law notary is a person of considerable importance." *See generally*, Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 Hastings Int'l & Comp. L. Rev. 389 (1996).

observed that Colorado's requirement that petition circulators be registered voters as well as state residents "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," and thus "significantly inhibit[s] communication with voters about proposed political change." 525 U.S. at 192-93. In both cases, the burden thus imposed on petition-circulating called for strict or "exacting" judicial scrutiny.[12]

This case, like *Meyer* and *Buckley*, involves a burden on basic free expression rights. Puerto Rico's lawyer-notary requirement prevents petitioner from using its non-lawyer members and other volunteers to communicate with voters about proposed political change through the process of soliciting and obtaining signatures on party-registration petitions. The requirement thus "limits the number of voices" able to convey petitioner's message and "the size of the audience they can seek." *Meyer*, 486 U.S. at 422-23. By drastically reducing "the number of persons . . . available to circulate petitions" it "significantly inhibit[s] communication with voters about projected political change." *Buckley*, 525 U.S. at 192-93.

In its opinion on reconsideration, the Supreme Court of Puerto Rico sought to distinguish *Buckley* and *Meyer* on the ground that, unlike the statutes in those cases, Puerto Rico's lawyer-notarization requirement does not "restrict the freedom of speech of the members of the Civil Action Party" (App. 14d). The court reasoned that non-lawyer Party members "have complete liberty to make the expressions they believe necessary," they merely had either to "have a notary go with them in endorsement collection campaigns," or "send or take the voters to the offices of the notaries" (App. 14d, 15d n.7).

The same options were present in both *Buckley* and *Meyer*, where the statutes restricted only the "circulation" of petitions. Advocates of initiative propositions who could not circulate petitions remained free in those cases to try to

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[12] *See* note 6 *supra*.

convince voters to sign petitions circulated by others who were authorized to be circulators. The Court in those cases recognized, however, that speech designed to persuade voters to sign a political petition is severely burdened when the speaker may only speak about, but not circulate, petitions. The lawyer-notarization requirement means that in Puerto Rico only lawyers may effectively circulate party registration petitions.

In addition to free expression, Puerto Rico's requirement also burdens rights not involved in either *Buckley* or *Meyer* – the associational "right of citizens to create and develop new political parties,"[13] as well as the right to vote, a right that is " 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' " *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), quoting from *Williams v. Rhodes, supra*, 393 U.S. at 31.

The limitation on the number of voices able to carry the Civil Action Party's message to voters through the petition process in this case is, moreover, many times more drastic than in either *Meyer* or *Buckley*. Petitioner is completely forbidden by law from following the traditional Puerto Rican political practice of using *ad hoc* notaries – citizen volunteer campaign workers authorized by the Commonwealth's Elections Commission to gather and notarize election petition signatures on behalf of parties or candidates.[14] It must, instead, attempt to hire practicing attorneys who have been certified as notaries, presumably at their usual hourly rates, to do the time-consuming, tiresome and completely non-

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[13] Norman v. Reed, *supra*, 502 U.S. at 288.

[14] "Hard work and sacrifice by dedicated volunteers are the life blood of any political organization." American Party of Texas v. White, 415 U.S. at 787.

lawyer-like work of political canvassing or soliciting for a cause with which those attorneys may have little or no sympathy. These attorneys, moreover, may be strongly disinclined to work for a new party if its program is strongly opposed by either or both of the two political parties that have shared dominant political power in Puerto Rico for more than 50 years. The burden imposed by Puerto Rico's requirement is especially heavy in rural areas, where the nearest lawyer-notary may be many miles away.

In its complaint in this case, the Party alleged that it "only has two attorneys to collect and swear the petitions for registration," that "these attorneys can only work a few hours on some weekends or holidays" and that, as a result, the Party "is unable to collect endorsements," making access to the general election ballot "impossible." (App. 5e, 14e-15e). In affirming the judgment dismissing the Party's complaint, the Supreme Court of Puerto Rico acknowledged the burden imposed on the Party through the attorney-notarization requirement, stating that "[t]here is no doubt" that the requirement makes ballot access "more difficult." (App. 26a). (In fact, no new party has been able to achieve ballot access in Puerto Rico since 1984.) The superior court had, for its part, found the challenged requirement to be "substantially onerous." (App. 23c). The Supreme Court nevertheless failed to require the Commonwealth to demonstrate that the lawyer-notarization requirement was narrowly tailored to serve a compelling government interest because access to the ballot had not been made completely "impossible." This failure was clear constitutional error, calling for this Court's review.

Review is also warranted in order to resolve the existing conflict regarding the applicable constitutional standard between the decision of the Supreme Court of Puerto Rico below and the decision of the Court of Appeals for the First Circuit in the parallel federal litigation. See, e.g., *Hagen v. Utah*, 510 U.S. 399, 409 (1997). *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985). Unlike the Supreme Court of Puerto Rico, the

First Circuit correctly applied strict scrutiny to the Party's challenge to the lawyer-notary requirement, holding that, "if . . . appellants can prove that notarization is prohibitively expensive or otherwise difficult to achieve (as the complaint avers) then the Commission will have to show that the notarization requirement is narrowly drawn to advance a compelling governmental interest." *Cruz*, 204 F.3d at 22. This conflict in constitutional standards requires resolution. If certiorari were to be denied, new political parties seeking ballot access in Puerto Rico would be subject to significantly different levels of constitutional protection, depending upon whether ballot-access restrictions were challenged before Commonwealth or federal courts.

II. THE LAWYER-NOTARIZATION REQUIREMENT IS NOT NARROWLY TAILORED TO SERVE ANY OF PUERTO RICO'S LEGITIMATE INTERESTS.

If the correct standard is applied, the unconstitutionality of the lawyer-notarization requirement is apparent. Puerto Rico's rule that only lawyers may notarize new-party ballot-access petitions is unquestionably *not* narrowly tailored to serve any of the Commonwealth's legitimate regulatory interests.

To begin with, it would be quite remarkable if conditions in Puerto Rico were so different from those in the remainder of the United States that it, alone among United States jurisdictions, would find it necessary to exclude everyone but practicing lawyers from the function of attesting to the authenticity of signatures on ballot-access petitions.[15] It

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[15] We have been unable to find any other United States jurisdiction that requires each signature on an electoral petition to be notarized by a lawyer. Indeed, although Texas, Utah, and Indiana once required each signature to be notarized by an ordinary notary-public, *see* American Party of Texas v. White, *supra*, at 787; Einhorn, *Non-initiative Petition Requirements for Third Party and Independent Candidate Ballot Access*, 11 Suff. U. L. Rev. 974, 1019, 1023 (1977), none of those States appears to have

strains belief to imagine that *only* members of the bar, alone among all American citizens of Puerto Rico, can be trusted with the task of checking drivers licenses, passports or electoral IDs.[16] Moreover, as Judge Negrón-Garcia observed in his opinion dissenting from the Puerto Rico Supreme Court's denial of reconsideration below, there is something extremely disquieting (Judge Negrón-Garcia's characterization was "elitist and irritating") about giving to this single professional group, "the exclusive prerogative of giving efficacy and legal virtuality to the rights of speech, association and suffrage of the voters." (App. 21d).

Other provisions of Puerto Rican law, as well as long-standing Commonwealth practice, confirm that there is, in fact, no good reason to permit only lawyers to perform the notarial function for ballot-access petitions. Section 3161 of Puerto Rico's election code, 16 L.P.R.A § 3161, provides that petitions of candidates to appear on the ballot in the party primaries of the three established parties "may be sworn to before the officials authorized by law to take oaths [i.e. lawyer-notaries] *as well as before any elector authorized by the [Elections] Commission to perform such duty, at the request of each candidate for primaries.*" (emphasis added) This so-called *ad hoc* notary procedure, through which non-lawyer campaign workers are certified by the Elections Commission to perform the notarial function, is legally available and widely used in Puerto Rico as the means by which signatures are validated in support of party primary candidates. It is also

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retained even that requirement. Some States require the petition *circulator* to submit a statement notarized by an ordinary (non-lawyer) notary public.

[16] Nor does excluding everyone but lawyers from the petition-notarization function guarantee either carefulness or honesty. *See, e.g., In re* Landing; y Aulet, 107 D.P.R. 103 (1978) (two members of Puerto Rican bar suspended from practice of law for irregularities in petition authentication including notarization of forged signatures).

used by independent candidates seeking access to the general election ballot, and by new political parties seeking local party registration. It was, moreover, also authorized for use by political groups seeking public funding, as well as ballot access, in connection with the Commonwealth's 1998 plebiscite election concerning its future political relationship with the United States. No reason appears why the Commonwealth Elections Commission, composed of representatives of the established parties, cannot safely be authorized to designate appropriate non-lawyers as *ad hoc* notaries to perform the notarial function in Commonwealth-wide party registration efforts as well. Those notaries are fully subject to Puerto Rico's penal code, which imposes serious criminal penalties on persons who prepare or present false writings in official proceedings. See 33 L.P.R.A. §§ 4437 and 4438. See *Buckley*, 525 U.S. at 204 (stating that criminal penalties are "less problematic" than broader restrictions for deterring fraud and diminishing corruption in connection with ballot-initiative petitions); *Meyer*, 486 U.S. at 427 (stating that criminal penalties are "adequate to the task" of minimizing fraud and corruption in the circulation of initiative petitions).

The role of the Commonwealth Elections Commission in validating party-registration petitions is additional confirmation of the overbreadth of the exclusion of all non-lawyers from the notarization function. The Commission's rules (*supra* at pp. 4-5) require it to deny any registration petition if the person signing it is not a registered voter, if that person signed a registration petition for another party during the preceding two years, if the "signature of the petitioner is incompatible with the one that appears in the petition for inscription," or if there are discrepancies in the name of the petitioner's father or mother or in the petitioner's age (all of which must appear on the voter's petition). The Commission's review of submitted petitions must thus include a comparison of the signature of, and data regarding, the petition signer with the information already on file with the Commission through the petition signer's registration as a voter. This review serves as a back-up for the functions that

are also served by notarization – verification of the petitioner's identity and his or her status as a registered voter entitled to sign a party-registration petition. If the Commission's abilities to limit the designation of *ad hoc* notaries to trustworthy individuals and to check the petitions submitted by those notaries for validity is, for some reason, believed to be inadequate to safeguard against the submission of fraudulent or frivolous petitions, narrow tailoring requires strengthening of the Commission's procedures, not the wholesale exclusion of all of Puerto Ricans who are not practicing lawyers from participation in the petition-gathering process.

III. PETITIONER'S SUPPOSED LACK OF "DILIGENCE" DOES NOT DISQUALIFY IT FROM OBTAINING RELIEF.

In denying petitioner's motion for reconsideration, the Supreme Court of Puerto Rico appeared to rely in part on the supposed lack of "diligence" of the Party in seeking to obtain the required number of petition signatures, despite the lawyer-notarization requirement. The court discerned a "tendency" on petitioner's part "to depend exclusively in litigation" as a means of obtaining party registration (App. 5d). To the extent that the lower court took this factor into account in its decision, it was in error. Individuals and organizations faced with unconstitutional burdens on their constitutional rights are entitled to seek judicial removal of those burdens without first having to expend limited resources in an effort to comply with the unconstitutional obstacles. See, e.g., *Meyer*, 486 U.S. at 417. The Party in this case took all the steps needed for registration except the step burdened by the unconstitutional lawyer-notary requirement. As the superior court held (App. 6c-8c), it clearly had standing to bring this challenge to the lawyer-notarization requirement.

Nor would a ruling that the challenged burdens are unconstitutional constitute achievement of the Party's registration goal "exclusively" through litigation, as the Supreme

Court of Puerto Rico feared. The Party does not seek a judgment that it is a registered party entitled to ballot access and public funding. It understands that in order to achieve registered status, it must obtain the support of nearly 100,000 registered Commonwealth voters. It has instituted litigation in order to enable it to solicit support from those voters without having to do so exclusively through lawyers – to be permitted to utilize the *ad hoc* notary procedures applicable to all other ballot-access matters.

IV. PETITIONER IS ENTITLED TO A DECLARATION THAT THE LAWYER-NOTARIZATION REQUIREMENT IS UNCONSTITUTIONAL.

The failure of the courts below to apply the correct constitutional standard in determining whether to dismiss petitioner's complaint would ordinarily call for this Court to vacate the order of dismissal, giving petitioner the opportunity to prove the severity of the burden imposed on it by the challenged requirements and, if that burden is established, giving the Commonwealth the opportunity to prove that the burden is narrowly tailored to serve compelling governmental interests. There seems no dispute, however, that a severe burden on fundamental rights exists in this case, and it also seems clear that the designation of lawyers – and only lawyers – as the only individuals legally capable of notarizing new-party registration petitions in Puerto Rico cannot possibly be defended as a narrowly tailored method for insuring petition integrity. If the petition for a writ of certiorari is granted, petitioner therefore intends to suggest to the Court the propriety of its declaring the lawyer-notarization requirement unconstitutional without the necessity for further factual or legal exploration of that issue in the courts below.[17]

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[17] Although it is now too late for petitioner to collect the required number of signatures to appear on the November, 2000, ballot, the action is not moot. *See, e.g.*, Meyer v. Grant, 486 U.S. at 417 n.2; Norman v. Reed, 502 U.S. at 287-88. Petitioner

CONCLUSION

The decision of the Supreme Court of Puerto Rico, upholding the Commonwealth's rule that only lawyers can notarize voter petitions in support of new political parties seeking access to the general election ballot, severely and unnecessarily burdens the American citizens of Puerto Rico in exercising the most basic of rights in a free society – the right to organize, join and vote for a political party of their choice. The petition for a writ of certiorari should be granted to enable the Court to review this harmful and unconstitutional decision.

Respectfully submitted.

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July, 2000

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would like to ensure its place on the November, 2004, general election ballot by beginning to solicit petitions of endorsement through *ad hoc* notaries on the earliest possible date.

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